

INTRODUCTION TO THE FALL 2011 REGULATORY PLAN

Executive Order 12866, issued in 1993, requires the annual production of a Unified Regulatory Agenda and Regulatory Plan. It does so to promote transparency – or in the words of the Executive Order itself, “to have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this Executive order.”

The requirements of Executive Order 12866 were reaffirmed in Executive Order 13563, issued in 2011. Consistent with Executive Orders 13563 and 12866, we are now providing the Unified Regulatory Agenda and the Regulatory Plan for public scrutiny and review. Such scrutiny and review are closely connected with the general goal, central to Executive Order 13563, of promoting public participation in the rulemaking process.

It is important to understand that the Agenda and Plan are intended merely to serve as a preliminary statement, for public understanding and assessment, of regulatory and deregulatory policies and priorities that are now under contemplation. This preliminary statement often includes a number of rules that are not issued in the following year and that may well not be issued at all. This year, we have taken several new steps to clarify the purposes and uses of the Agenda and Plan and to improve its presentation. Among other things, we have narrowed the list of “active rulemakings” to rules that are not merely under some form of contemplation but that also have at least some possibility of issuance over the next year. We have also made it easier to understand which rules are active rulemakings rather than long-term actions or completed actions. But it remains true that rules on this list, designed among other things “to involve the public and its State, local, and tribal officials in regulatory planning,” must undergo serious internal and external scrutiny before they are issued -- and that there are rules on the list that may never be issued.

In this light, it should be clear that this preliminary statement of policies and priorities has extremely important limitations. No regulatory action can be made effective until it has gone through legally required processes, including those that involve public scrutiny and review. For this reason, the inclusion of a regulatory action here does not necessarily mean that it will be finalized or even proposed. Any proposed or final action must satisfy the requirements of relevant statutes, Executive Orders, and Presidential Memoranda. Those requirements, public comments, and new information may or may not lead an agency to go forward with an action that is currently under contemplation and that is included here. For example, the directives of Executive Order 13563, emphasizing the importance of careful consideration of costs and benefits, may lead an agency to decline to proceed with a regulatory action that is presented here.

It is also important to note that under Executive Order 12866, whether a regulation counts as “economically significant” is not an adequate measure of whether it imposes high costs on the private sector. Economically significant actions may impose small costs or even no costs. For example, regulations may count as economically significant not because they impose significant costs, but because they confer large benefits. Moreover, many regulations count as economically

significant not because they impose significant regulatory costs on the private sector, but because they involve transfer payments as required or authorized by law.

It should be observed that the number of economically significant actions listed as under active consideration here – 138 – is lower than the corresponding figure for Spring 2011 (149) and for Fall 2010 (140). It is notable that the number of such rules has not grown even taking account of rules implementing the Affordable Care Act and the Wall Street Reform and Consumer Protection Act. We also note that the net benefits of regulation were unusually high in Fiscal Year 2011 (well over \$50 billion for the year alone). In addition, the aggregate costs for that year (under \$8 billion) were lower than in Fiscal Year 2010 and were not out of line with those in recent years, including during the Bush Administration.

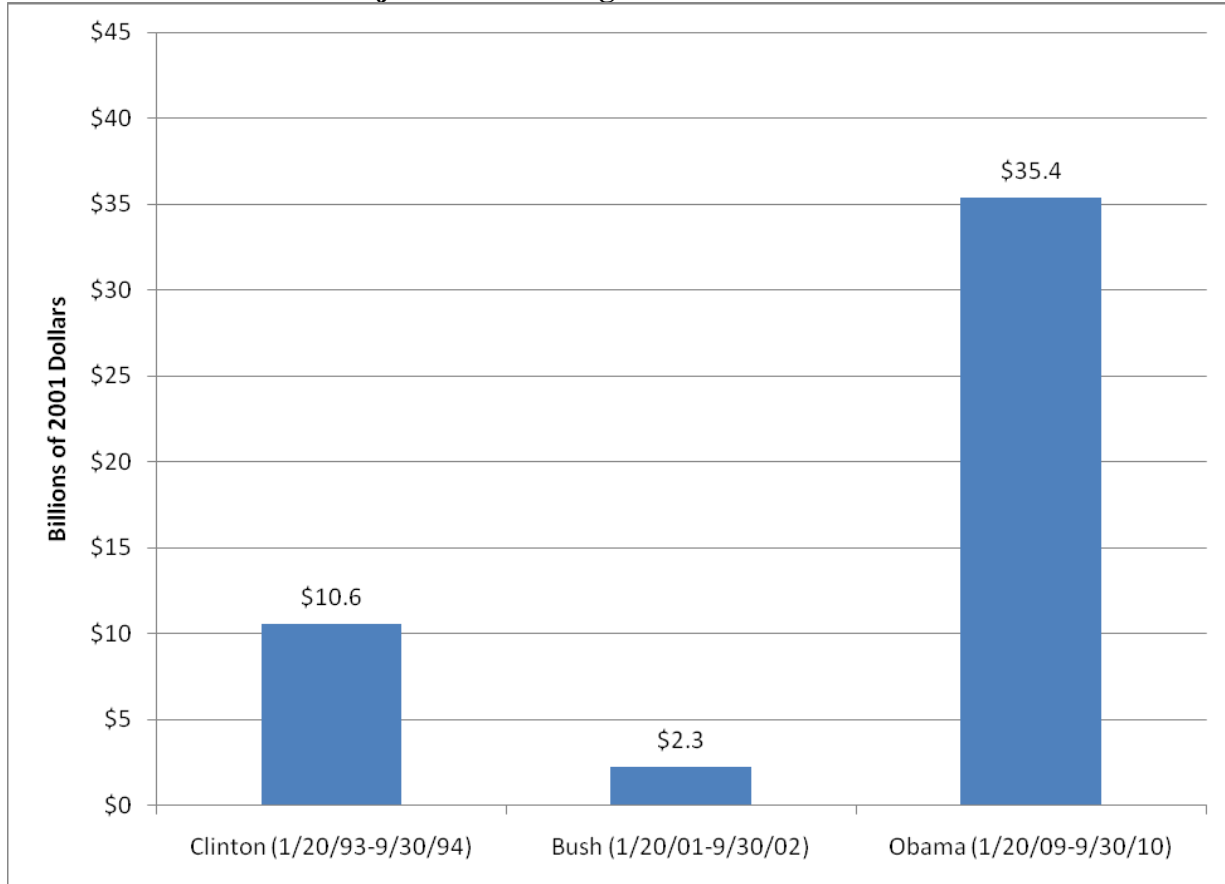
With these notes and qualifications, the Regulatory Plan provides a list of important regulatory actions that are now under contemplation for issuance in proposed or final form during the upcoming fiscal year. In contrast, the Unified Agenda is a more inclusive list, including numerous ministerial actions and routine rulemakings, as well as long-term initiatives that agencies do not plan to complete in the coming year.

We hope that public scrutiny of the Regulatory Plan and the Unified Agenda might help ensure, in the words of Executive Order 13563, a regulatory system that protects “public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.”

As discussed below, a large number of significant recent steps have been taken, consistent with Executive Order 13563, to reduce regulatory costs and ensure that our regulatory system is consistent with promoting growth and job creation. At the same time, a number of steps have been taken to promote public health, welfare, safety, and our environment. It is important to emphasize that the net benefits of recent rules, including the monetized benefits, are high – over the first two fiscal years of this Administration, in excess of \$35 billion. Rules have been issued and initiatives have been undertaken that are saving lives on the highways and in workplaces; reducing air and water pollution, preventing thousands of deaths in the process; increasing fuel economy, thus saving money while reducing pollution; making both trains and planes safer; increasing energy efficiency, saving billions of dollars while increasing energy security; combating childhood obesity; and creating a “race to the top” in education. Consider, as merely one example, the fact that in 2010, the rates of roadway fatalities and injuries fell to their lowest recorded levels and to their lowest numbers since 1949. The decrease is attributable, in part, to a range of regulatory actions and to private-public partnerships that have increased safety.

Since President Reagan’s Executive Order 12291, issued in 1981, a principal focus of the Office of Information and Regulatory Affairs, and of regulatory policy in general, has been on maximizing net benefits. In this Administration, agencies and OMB have worked together to issue a number of rules for which the benefits exceed the costs, and by a large margin. Consider the following figure:

Annual Net Benefits of Major Rules Through the Second Fiscal Year of an Administration



These figures reflect the numbers for 2009 and 2010. As noted, the net benefits for 2011 are expected to be unusually high (in excess of \$50 billion); they will be discussed in detail in the 2012 Report to Congress on the Benefits and Costs of Federal Regulations.

The recent steps build on a great deal of new learning about regulation. As a result of conceptual and empirical advances, we know far more than during the New Deal and the Great Society. We have also learned much since the 1980s and 1990s. These lessons have informed the Administration's efforts to protect public health and safety while also promoting economic growth and job creation. Eight points are particularly important:

1. We are now equipped with state-of-the-art techniques for anticipating, cataloguing, and monetizing the consequences of regulation, including both benefits and costs.
2. We know that risks are part of systems, and that efforts to reduce a certain risk may increase other risks, perhaps even deadly ones, thus producing ancillary harms—and that efforts to reduce a certain risk may reduce other risks, perhaps even deadly ones, thus producing ancillary benefits.
3. We know that flexible, innovative approaches, maintaining freedom of choice and respecting heterogeneity and the fact that one size may not fit all, are often desirable, both because they preserve liberty and because they frequently cost less.

4. We know that large benefits can come from seemingly modest and small steps, including simplification of regulatory requirements, provision of information, and sensible default rules, such as automatic enrollment for retirement savings.

5. We know, more clearly than ever before, that it is important to allow public participation in the design of rules, because members of the public have valuable information about likely effects, existing problems, creative solutions, and possible unintended consequences.

6. We know that if carefully designed, disclosure policies can promote informed choices and save both money and lives.

7. We know that intuitions and anecdotes are unreliable, and that advance testing of the effects of rules, as through pilot programs or randomized controlled experiments, can be highly illuminating.

8. We know that it is important to explore the effects of regulation in the real world, to learn whether they are having beneficial consequences or producing unintended harm. We need to consult, and to learn from, those who are affected by rules.

Executive Order 13563 draws on these understandings and emphasizes the importance of protecting “public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.” Executive Order 13563 explicitly points to the need for predictability and for certainty, and for use of the least burdensome tools for achieving regulatory ends. It indicates that agencies “must take into account benefits and costs, both quantitative and qualitative.” It explicitly draws attention to the need to measure and to improve “the actual results of regulatory requirements” – a clear reference to the importance of retrospective evaluation.

Executive Order 13563 reaffirms the principles, structures, and definitions in Executive Order 12866, which has long governed regulatory review. In addition, it endorses, and quotes, a number of provisions of that Executive Order that specifically emphasize the importance of considering costs – including the requirement that to the extent permitted by law, agencies should not proceed in the absence of a reasoned determination that the benefits justify the costs. Importantly, Executive Order 13563 directs agencies “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” This direction reflects a strong emphasis on quantitative analysis as a means of improving regulatory choices and increasing transparency.

Among other things, Executive Order 13563 sets out five sets of requirements to guide regulatory decision making:

■ *Public participation.* Agencies are directed to promote public participation, in part by making supporting documents available on Regulations.gov in order to promote transparency and public comment. Executive Order 13563 also directs agencies, where feasible and appropriate, to engage the public, including affected stakeholders, before rulemaking is initiated.

■ *Integration and innovation.* Agencies are directed to attempt to reduce “redundant, inconsistent, or overlapping” requirements, in part by working with one another to simplify and harmonize rules. This important provision is designed to reduce confusion, redundancy, and excessive cost. An important goal of simplification and harmonization is to promote rather than

to hamper innovation, which is a foundation of both growth and job creation. Different offices within the same agency might work together to harmonize their rules; different agencies might work together to achieve the same objective. Such steps can also promote predictability and certainty.

- *Flexible approaches.* Agencies are directed to identify and consider flexible approaches to regulatory problems, including warnings, appropriate default rules, and disclosure requirements. Such approaches may “reduce burdens and maintain flexibility and freedom of choice for the public.” In certain settings, they may be far preferable to mandates and bans, precisely because they maintain freedom of choice and reduce costs. The reference to “appropriate default rules” signals the possibility that important social goals can be obtained through simplification – as, for example, in the form of automatic enrollment, direct certification, or reduced paperwork burdens.

- *Science.* Agencies are directed to promote scientific integrity, and in a way that ensures a clear separation between judgments of science and judgments of policy.

- *Retrospective analysis of existing rules.* Agencies are directed to produce preliminary plans to engage in retrospective analysis of existing significant regulations to determine whether they should be modified, streamlined, expanded, or repealed.

Executive Order 13563 addresses both the “flow” of new regulations that are under development and the “stock” of existing regulations that are already in place. Executive Order 13563 emphasizes the importance of promoting predictability, of carefully considering costs, of choosing the least burdensome approach, and of selecting the most flexible, least costly tools. In addition, Executive Order 13563 calls for careful reassessment, based on empirical analysis. It is understood that the prospective analysis required by Executive Order 13563 may depend on a degree of speculation and that the actual costs and benefits of a regulation may be lower or higher than what was anticipated when the rule was originally developed. It is also understood that circumstances may change in a way that requires reconsideration of regulatory requirements. After retrospective analysis has been undertaken, agencies will be in a position to reevaluate existing rules and to streamline, modify, or eliminate those that do not make sense in their current form.

In August 2011, over two dozen agencies released final plans to remove what the President has called unjustified rules and “absurd and unnecessary paperwork requirements that waste time and money.” Over the next five years, billions of dollars in savings are anticipated from just a few initiatives from the Department of Transportation, the Department of Labor, the Department of Health and Human Services, and the Environmental Protection Agency. And all in all, the plans’ initiatives will save tens of millions of hours in annual paperwork burdens on individuals, businesses, and state and local governments.

The plans span over 800 pages and offer more than 500 proposals. Some plans list well over 50 reforms. Many of the proposals focus on small business. Indeed, a number of the initiatives are specifically designed to reduce burdens on small business and to enable them to do what they do best, which is to create jobs. Some of the proposed initiatives represent a fundamental rethinking of how things have long been done – as, for example, with numerous efforts to move

from paper to electronic reporting. For both private and public sectors, those efforts can save a great deal of money. Over the next five years, the Department of Treasury's paperless initiative will be saving \$400 million and 12 million pounds of paper.

Many of the reforms will have a significant economic impact:

- The Occupational Safety and Health Administration has announced a final rule that will remove over 1.9 million annual hours of redundant reporting burdens on employers and save more than \$40 million in annual costs. Businesses will no longer be saddled with the obligation to fill out unnecessary government forms, meaning that their employees will have more time to be productive and do their real work.

- To eliminate unjustified economic burdens on railroads, the Department of Transportation is reconsidering parts of a rule that requires railroads to install equipment on trains. DOT has proposed to refine the requirements so that the equipment is installed only where it is really needed on grounds of safety. DOT expects initial savings of up to \$325 million, with total 20-year savings of up to \$755 million.

- EPA has proposed to eliminate the obligation for many states to require air pollution vapor recovery systems at local gas stations, on the ground that modern vehicles already have effective air pollution control technologies. The anticipated annual savings are \$87 million.

- The Departments of Commerce and State are undertaking a series of steps to eliminate unnecessary barriers to exports, including duplicative and unnecessary regulatory requirements, thus reducing the cumulative burden and uncertainty faced by American companies and their trading partners. These steps will make it a lot easier for American companies to reach new markets, increasing our exports while creating jobs here at home.

- To promote flexibility, the Department of Health and Human Services has proposed two rules, and finalized another, to reduce burdensome regulatory requirements now placed on hospitals and doctors. These reforms are expected to save more than \$1 billion annually.

The regulatory lookback is not merely a one-time exercise. Regular reporting, about recent progress and coming initiatives, is required. The goal is to change the regulatory culture to ensure that rules on the books are reevaluated and are effective, cost-justified, and based on the best available science. By creating regulatory review teams at agencies, we will continue to examine what is working and what is not and to eliminate unjustified and outdated regulations.

In addition to looking back at existing regulations, we are looking forward to ensure that future regulations are well-justified. Executive Order 13563 provides critical guidance with its emphasis on careful consideration of costs and benefits, public participation, integration and innovation, flexible approaches, and science. These requirements are meant to produce a regulatory system that draws on recent learning, that is driven by evidence, and that is suited to the distinctive circumstances of the twenty-first century.